

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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<http://www.montgomerycountymd.gov/boa/>**

CASE NO. A-6517

PETITION OF DANIEL E. DELMAR

OPINION OF THE BOARD

(Opinion Adopted April 12, 2017)
(Effective Date of Opinion: May 8, 2017)

Case No. A-6517 is an application for a variance to allow an accessory structure that would exceed the maximum footprint allowed in the RC zone for such a structure. Section 59-4.3.4.B.2.e of the Zoning Ordinance limits the maximum footprint of an accessory building on a lot where the main building is a detached house to 50% of the footprint of the main building.¹

The Board of Appeals held a hearing on the application on April 12, 2017. Petitioner Daniel E. Delmar appeared at the hearing with his attorney, David Schiller, Esquire. Valerie Frank, Mr. Delmar's designer and architect, also appeared.

Decision of the Board: Variance DENIED.

EVIDENCE PRESENTED

1. The subject property is Lot 16, Block E, Upper Seneca Crest Subdivision located at 2 Hilton Court, Gaithersburg, Maryland, 20882, in the RC Zone.
2. The Statement submitted with the variance application asserts that the "proposed location for the addition to the existing accessory structure is in accordance with the historic development plan for the lot and the street. Two accessory structures

¹ After the conclusion of the hearing, the Petitioner's architect informed Board staff that she had submitted other building permit denials when she filed the variance application which would have required the grant of additional variances. After some searching, it was determined that these permit denials had been attached to the copies of the variance application that are required to be submitted with the original application. Since the Board did not send notice of these variances, and was not aware of the need for them during the hearing, they were not considered at the April 12, 2017 proceedings. The Board therefore issues this Opinion without prejudice as to any other variance requests which may be forthcoming in connection with this property.

have previously been permitted and approved in this location. The first approved and constructed in 1997 and the second in 2003. A third approval was issued in 2009 but the petitioner elected not to proceed with that construction." See Exhibit 3.

3. The Statement further indicates that "[d]ue to the fact that the property is a corner lot and that the home is constructed on a diagonal, the petitioner had to review and discuss with Montgomery County officials his choice of which of the two remaining lot lines would be considered a side yard and which a rear yard. This fact, in addition to the septic reserve area make using the area behind the house not useful for his accessory structures." See Exhibits 3 (Statement), 4(a) (septic permit and related documentation), and 4(b) (site plan).
4. At the outset of the hearing, the attorney for the Petitioner stated that the Petitioner is not proposing an "addition to an existing structure," as was indicated on the Statement submitted with the variance application (Exhibit 3), but rather is proposing to locate a separate, prefabricated building next to an existing accessory structure.
5. The Petitioner testified that there are already two accessory structures on his property, one approximately 30 feet x 50 feet (1,500 square feet), and the other approximately 30 feet x 40 feet (1,200 square feet), for a total accessory structure footprint of 2,700 square feet. He testified that the proposed (third) accessory building would have a footprint of 1,800 square feet (30 feet x 60 feet)(see Exhibit 4(b)). He testified that his home has a footprint of approximately 3,700 square feet, a figure which he later revised to 3,500 square feet. After a Board member commented that the footprint of the accessory buildings already exceeds 50% of the footprint of the house, the Petitioner's attorney stated that he believes the 50% limitation is per accessory building, not cumulative.
6. The Petitioner's architect testified that the grade behind the house is not suitable for the location of an accessory structure. She testified that the proposed accessory structure could be attached to the Petitioner's home, but that that would be unattractive and not in keeping with the existing area. She testified that it would be more harmonious with the area to put the proposed accessory structure near the existing accessory structures.
7. The Petitioner testified that he is seeking this new accessory structure to remodel cars and to store a recreational vehicle ("RV"). The Petitioner testified that he is looking at buying a 30- or 40-foot RV to use for travel in retirement, and that he wants to be able to protect it. He testified that the second floor of the proposed structure would be used for storage. He testified that the building is completely surrounded by the treeline and woods, and would not be very visible.
8. The Petitioner testified that his home sits on a hill, above the accessory buildings, and that the hillside slopes off towards a creek. In response to Board questions,

he testified that one of the existing accessory buildings is used for his plumbing business, the other for mowers, jet skis, and vehicles. When pressed about the use of one of the accessory buildings for his business, the Petitioner testified that he has a plumbing business that is licensed by the County. He testified that he has two pickup trucks at his house, per the County Code. He testified that most of his business is commercial new construction, and that as a result, materials are shipped directly to the construction site, not to his home. In response to Board questions arising from letters received by the Board which indicate that the Petitioner runs a large business, the Petitioner testified that he has 19 employees, but that they report straight to the construction site and not to his house, again because the work his company does is commercial new construction. He testified that County inspectors come to his house, and that he is in compliance with the County laws.

9. The Petitioner's architect testified that the topography of the property poses a problem for the location of the proposed accessory building to the rear of the house. The Petitioner testified that construction in that area would require the removal of trees, and would be very challenging because the topography there is very steep, sloping toward a creek and floodplain. His attorney later reiterated that the property was extraordinary because of this hill, because of the location of the house on the hill, and because of the location on the property in which the County had previously allowed accessory structures to be placed.
10. The Petitioner testified that he intends to reside at the subject property for the rest of his life. He testified to his belief that when he purchased the property,² the construction he proposes would have been allowed. He testified that the change to the Zoning Ordinance limiting the size of accessory structures to 50% of the footprint of the main building was enacted in 2008, and that he had been granted permits to expand his accessory structure in 2009. Expounding on that point, his attorney explained that in 2009, the Petitioner had been granted building permits to expand one of the existing accessory structures on both sides (16 feet x 30 feet and 16 feet x 50 feet), but that the Petitioner elected not to go forward with that construction. The Petitioner then estimated that the proposed accessory structure would be 50- to 100-square feet greater than 50% of the footprint of his home, which he said he built and which he estimated was approximately 3,500 square feet.
11. In response to a Board question asking who determined the size of the accessory structure that he was proposing, the Petitioner testified that he did. When the Petitioner was asked if he could make the proposed structure slightly smaller so that a variance would not be needed, the Petitioner's attorney testified that he could also recalculate the size of the Petitioner's home, which the Petitioner's architect testified she may have misrepresented as being only 3,000 square feet. See Exhibit 4(b).

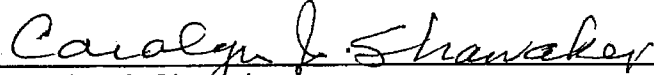
² The Petitioner purchased this property in 1977. See Exhibit 3.

FINDINGS OF THE BOARD

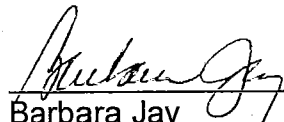
Based on the Petitioner's binding testimony and the evidence of record, the Board finds that the requested variance cannot be granted. The Board finds, based on the Petitioner's testimony, that he determined the size of his proposed accessory structure, and that the footprint of the proposed structure, though large at 30 feet x 60 feet, is only 50- to 100-square feet over the 50% footprint limitation of Section 59-4.3.4.B.2.e of the Zoning Ordinance. While the Board understands the prefabricated nature of the proposed accessory structure, the Board nevertheless finds that the size of the proposed structure was determined by the Petitioner and was not necessitated by any unique features of the subject property. Thus the Board finds that the requested variance fails to meet Section 7.3.2.E.2.c. of the Zoning Ordinance because it is not the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property. The Petitioner has failed to provide sufficient evidence of the practical difficulty that would be caused by the denial of the variance. Practical difficulty has previously been defined as a situation where the property, as a practical matter, cannot be used for a permitted use without coming in conflict with the restrictions of the setback ordinance. See 3 Rathkopf, The Law of Zoning and Planning, §38.04 (4th ed. 1997). The courts have defined this need as "[t]he need sufficient to justify an exception must be substantial and urgent and not merely for the convenience of the applicant." Carney v. City of Baltimore, 201 Md. 130, 137 (1952). The Petitioner's evidence established that there are already two sizeable accessory buildings on the property, and that this requested third building is for "historic automobile restoration" (see Exhibit 3), and for storing an RV that the Petitioner is contemplating buying in the future and which the Petitioner has testified would be one-half to two-thirds of the length of the requested accessory building. Accordingly, the Board finds that the proposed accessory building is for the personal convenience of the Petitioner, and that the requested variance cannot be granted. Having found that the requested variance fails this part of the variance test and therefore must be denied, the Board need not address the remaining factors for the grant of a variance.

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Vice Chair, seconded by Edwin S. Rosado, with Carolyn J. Shawaker, Chair, Stanley B. Boyd, and Bruce Goldensohn in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.


Carolyn J. Shawaker
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 8th day of May, 2017.

A handwritten signature in cursive script, appearing to read "Barbara Jay", is written over a horizontal line.

Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.